

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA**

STEVEN FONTINOTT,)	
)	
Plaintiff,)	
)	
v.)	CIV-07-721-R
)	
JIMMY PHILLIPS,)	
)	
Defendant.)	

ORDER

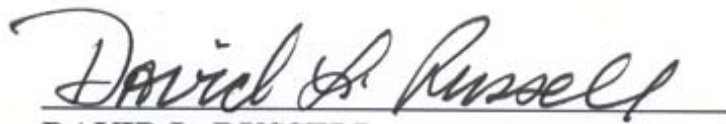
Before the Court are the Report and Recommendation of United States Magistrate Judge Doyle W. Argo entered August 21, 2007 [Doc. No. 8] and Plaintiff's Objection to the Report and Recommendation [Doc. No. 9]. The Magistrate Judge recommended dismissal of Plaintiff's federal law claims as barred by the applicable two-year statute of limitations. Plaintiff in his Objection to the Report and Recommendation relies on the "mailbox rule" to assert that this 42 U.S.C. § 1983 action was timely filed. Pursuant to 28 U.S.C. § 636(b)(1)(B), the Court reviews the Report and Recommendation *de novo* in light of Plaintiff's Objection.

While the Tenth Circuit has held that the mailbox rule applies to prisoners' 42 U.S.C. § 1983 complaints, *see Price v. Philpot*, 420 F.3d 1158, 1164 (10th Cir. 2005), the Plaintiff has the burden of proving that his Complaint was timely filed by evidence that he had access to a legal mail system, that he gave the Complaint to a prison official and it was logged in to the legal mail system on or before June 6, 2007, or an affidavit or sworn statement made under penalty of perjury stating that he deposited the mail with prison officials on or before

June 6, 2007 and that first class postage was prepaid. *See Price v. Philpot*, 420 F.3d at 1165-66; *United States v. Ceballos-Martinez*, 387 F.3d 1140, 1144-46 (10th Cir. 2004). Plaintiff has submitted no such evidence. Accordingly, Plaintiff is not entitled to rely on the mailbox rule, his Complaint was, therefore, untimely filed and this action is barred by the statute of limitations.

In accordance with the foregoing, the Report and Recommendation of the Magistrate Judge [Doc. No. 8] is ADOPTED; Plaintiff's federal law claims are DISMISSED for failure to state claims on which relief can be granted because they are untimely; and the Court declines to exercise supplemental jurisdiction over any state law claims included in the Complaint, which claims are also DISMISSED.

It is so ordered this 31st day of August, 2007.


DAVID L. RUSSELL
UNITED STATES DISTRICT JUDGE